

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DALRICK AION HENRY,

Defendant and Appellant.

B169274

(Los Angeles County Super. Ct.
No. VA058570)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Patrick T. Meyers, Judge. Affirmed.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr. and Douglas C. S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dalrick Henry appeals from a judgment following a jury trial in which he was convicted of attempted premeditated murder and assault with a firearm. He contends: (1) the trial court erred when it excluded evidence impeaching a prosecution witness; (2) the trial court erred when it failed to instruct the jury on accomplice testimony; (3) the trial court erred when it failed to inquire into juror misconduct; and (4) trial counsel was ineffective. We affirm.

PROCEDURAL BACKGROUND

Defendant and codefendant Richard Turner were charged by amended information with the attempted premeditated murder of Oral Gregory in violation of Penal Code sections 664 and 187, subdivision (a) and assault with a firearm on Chontrell Gregory in violation of Penal Code section 245, subdivision (a)(2). It was further alleged that codefendant Turner personally used a firearm within the meaning of Penal Code sections 12022.53, subdivision (d) and 12022.5, subdivision (a)(1) and personally inflicted great bodily injury within the meaning of Penal Code sections 12022.53, subdivision (d) and 12022.7, subdivision (a), and as to defendant that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a)(1). Defendant and codefendant Turner were convicted as charged. They both received life sentences. Defendant also received the upper term of four years concurrent for the assault conviction. On April 12, 2001, we affirmed the conviction of codefendant Turner (B144157). Defendant was given permission to file a belated notice of appeal.

FACTS

At approximately 7:30 a.m. on March 7, 2000, Oral and Chontrell Gregory and their three children were packing their belongings in order to move from an apartment in Bellflower to Washington, D.C. Oral and Chontrell Gregory were in the kitchen cleaning

and packing. The three children were outside by the moving van and the door to the apartment was open.

Defendant drove to the apartment with two other men and codefendant Turner. Defendant and the two other men entered the apartment without permission. They walked to the dining room and defendant sat in a chair. Codefendant Turner also entered the apartment, but stood behind a hallway wall. Oral and Chontrell Gregory noticed the three men in the dining room. Oral Gregory recognized defendant, whom he knew through his brother. Oral Gregory had seen defendant five to ten times previously, and defendant had been to the Gregory apartment on one previous occasion. Defendant demanded that Oral Gregory repay him some money defendant claimed Oral Gregory had borrowed. Oral Gregory disclaimed any knowledge of such a loan. Defendant threatened to kill Oral Gregory and his family if he did not receive his money. Oral Gregory said he did not have any money for defendant. Defendant and the other two men turned to leave the apartment.

As the three men were leaving, codefendant Turner pointed a gun at Oral Gregory from around the corner of the hallway. Oral Gregory recognized codefendant Turner, because he had seen codefendant Turner once previously in the company of defendant. Codefendant Turner fired at Oral Gregory, but the gun misfired. Codefendant Turner fired two more times, but did not strike either of the Gregorys. Codefendant Turner fired a third time and struck Oral Gregory in the shoulder. The bullet passed through the shoulder, entered Oral Gregory's chest, and penetrated his lungs. Codefendant Turner fired a fourth time and struck Chontrell Gregory in the leg. All four men fled in defendant's car, driven by defendant. They were pursued by police and ultimately apprehended. During the pursuit, defendant discarded gloves he had been wearing and took off a jumpsuit, which he had worn over his clothes. The gun used in the shooting was found in the car. It was a five-bullet revolver, with one misfired bullet, and four shell casings in the chamber.

Defendant testified that he had gone to the Gregorys' apartment to peacefully collect a debt from Oral Gregory, a friend. He had left the apartment when Oral Gregory became aggressive, ordered him to leave, and appeared to reach for a gun on his waist. Defendant testified that he had not known codefendant Turner was in possession of a gun and had not known codefendant Turner intended to shoot the Gregorys.

Codefendant Turner testified that defendant had provided him with the gun, had ordered him to shoot the Gregorys if they did not pay, and had threatened to kill him if he did not comply with this order. Codefendant Turner testified he fired the gun once, but it misfired and then defendant grabbed the gun and fired at the Gregorys four times.

DISCUSSION

I. Exclusion of Evidence¹

On July 17, 2000, prior to jury selection, trial counsel for defendant announced that he intended to call as a witness Jennifer Carnegie, the mother of the children of defendant's brother. On July 21, 2000, after the completion of the prosecution's case-in-chief, the prosecutor informed the trial court that the prosecution had not been given any written statement for Carnegie and defendant's trial counsel had instructed her not to speak to the prosecution. The trial court ordered the witness to be interviewed by the prosecution. After the interview, the prosecutor objected to the testimony of Carnegie on the grounds of discovery violations, hearsay, improper impeachment, relevancy, and Evidence Code section 352. Defendant's trial counsel told the trial court he had just met the witness for the first time that day. He expected her to testify that: (1) she heard Oral

¹ Defendant characterizes the trial court's evidence exclusion orders as a refusal to allow Jennifer Carnegie to testify. This is factually incorrect. The trial court did not exclude Carnegie as a witness. The trial court excluded three categories of evidence only on the ground of inadequate foundation, leaving open the possibility that defendant would provide a more substantial foundation for the testimony.

Gregory in late 1999 or early 2000 admit that he owed money to defendant and did not intend to pay it back; (2) Oral Gregory and defendant had a friendly relationship; and (3) in 1999 she witnessed Oral Gregory, who was armed with a gun, threaten to kill defendant's brother and then she had reported the incident to the police. The trial court found the foundation was inadequate as to the prior inconsistent statement on the debt, but noted Oral Gregory had not been excused and could still be recalled. The trial court also found the evidence of the friendly relationship to be irrelevant and more prejudicial than probative. The trial court stated that it would reconsider both of these issues if a further foundation was presented by defendant. As to the gun evidence, the trial court found the evidence unpersuasive, noted that there should be a police report of the incident, and excluded the evidence under Evidence Code section 352, unless some additional foundation was presented by defendant. No further proceedings occurred on the record with respect to this issue.

A. Prior Inconsistent Statement re Loan

Defendant contends the trial court erred when it prevented Carnegie from testifying as to the prior inconsistent statement of Oral Gregory on the ground of lack of foundation.

“Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code s]ection 770.” (Evid. Code, § 1235.)

“Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.” (Evid. Code, § 770.)

Compliance with Evidence Code section 770 requires that the witness has been afforded “‘a realistic opportunity to explain or deny any specific statement’ [Citation.]” (*People v. Garcia* (1990) 224 Cal.App.3d 297, 303.) The realistic opportunity to explain or deny “requires reference to *more than one* of the following, 1) the people involved in the conversation, 2) its time and place, or 3) the specific statements that were made during it.” (*Id.* at p. 304.) A trial court has discretion to compel a party to examine a witness about a prior statement, rather than compel the opposing party to recall the witness to explain or deny the statement. (See Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1995 ed.) foll. § 770 [“unless the interests of justice otherwise require”]; Jefferson, Cal. Evidence Law (Cont.Ed.Bar 1985) § 10.1, p. 164.)

An erroneous exclusion of evidence does not require the reversal of a judgment unless the error resulted in a miscarriage of justice. (Evid. Code, § 354.) “Where a ‘trial court’s ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense,’ the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to defendant. [Citations.]” (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.)

In this case, defense counsel did not cross-examine Oral Gregory about the loan statement purportedly made in the hearing of Carnegie. Oral Gregory testified he had not borrowed any money from defendant, but was not asked whether he had ever made a statement that he had borrowed money. When defense counsel proffered the prior inconsistent statement, the trial court noted that a proper foundation had not been laid, but Oral Gregory had not been excused as a witness and could be recalled in order to lay a proper foundation for the statement. Without a proper foundation, the trial court ordered the prior inconsistent statement excluded. Defense counsel did not attempt to recall Oral Gregory as a witness. We conclude the trial court did not abuse its discretion

in requiring defendant to question Oral Gregory about the statement prior to admitting the prior inconsistent statement.

In any event, there is no reasonable probability of a different result had the prior inconsistent statement evidence been admitted. Whether or not defendant made a loan to Oral Gregory was a peripheral issue. Defendant was not prevented from presenting a defense. Defendant testified that he had made a loan to Oral Gregory and had gone to the Gregory apartment to collect the loan. Codefendant Turner's testimony corroborated defendant's loan testimony. All witnesses agreed defendant went to the Gregory apartment to collect money. All witnesses agreed that Oral and Chontrell Gregory were shot. The fact that Oral Gregory may have lied about the existence of the loan had no bearing on whether defendant aided and abetted codefendant Turner in the attempted murder of Oral Gregory and the assault with a firearm on Chontrell Gregory because of their refusal to pay the money demanded. The trial of defendant was essentially a contest as to whether defendant knew codefendant Turner was armed and had instructed him to shoot the Gregorays.

B. Prior Inconsistent Statement re Friendship

Defendant contends the trial court erred when it excluded the testimony of Carnegie, that Oral Gregory had a friendly relationship with defendant and had contact with him more frequently than Oral Gregory admitted, on the grounds of irrelevancy and Evidence Code section 352.

All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is evidence that has any tendency in reason to prove or disprove a fact in issue. (Evid. Code, § 210.) The trial court has discretion to exclude relevant evidence if the trial court determines the proffered evidence is more prejudicial than probative. (Evid. Code, § 352.) Evidence is prejudicial if it is cumulative. (*People v. Thuss* (2003) 107

Cal.App.4th 221, 234.) An appellate court reviews the exclusion of evidence on these grounds for abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

We conclude there was no abuse of discretion in excluding this evidence. Oral Gregory testified that he had met defendant through his brother. He also testified that the relationship was friendly, he had seen defendant on five to ten occasions, defendant had been at his apartment on one occasion, and he had once met codefendant Turner in the company of defendant. There was no evidence that the relationship was unfriendly. The nature and extent of the relationship between defendant and Oral Gregory was peripheral and the testimony of Carnegie on this topic would have been merely cumulative.

C. Character Evidence

Defendant contends the trial court erred when it excluded the testimony of Carnegie that Oral Gregory had assaulted defendant's brother with a firearm in 1999 on the ground of Evidence Code section 352. Defendant contends the evidence was admissible character evidence under Evidence Code section 1103. Although the prosecution concedes this point, it responds that otherwise admissible evidence may nevertheless be excluded under Evidence Code section 352.

We conclude the trial court did not abuse its discretion in excluding the evidence. A specific unrelated instance of violent conduct on the part of Oral Gregory was of only marginal relevance. Self-defense was not at issue in the case and no instructions were given to the jury on self-defense.² Evidence of the prior incident of violence might therefore have been confusing to the jury and may have resulted in an undue consumption of time. In the absence of the police report, the prosecution could have

² In a statement to the police, defendant Turner claimed he had shot Oral Gregory in self-defense. This theory was not the theory on which the case was tried. Also, defendant testified that he thought he saw a gun on Oral Gregory's hip and then he left the apartment.

challenged the testimony with other evidence, resulting in a mini-trial on a collateral issue.³

II. Accomplice Testimony Instructions

The trial court instructed the jury as to aiding and abetting in the language of CALJIC Nos. 3.00 (Principals—Defined), 3.01 (Aiding and Abetting—Defined), and 3.03 (Termination of Liability of Aider and Abettor). The trial court also instructed the jury as to the sufficiency of the testimony of one witness in the language of CALJIC No. 2.27 without the corroboration modification. The prosecutor’s request for CALJIC No. 3.02 (Principals—Liability for Natural and Probable Consequences) was refused. No counsel requested and the trial court did not give CALJIC Nos. 3.11 (Testimony of Accomplice Must be Corroborated), 3.12 (Sufficiency of Evidence to Corroborate an Accomplice), or 3.18 (Testimony of Accomplice to be Viewed with Care and Caution). Defendant contends the trial court had a sua sponte duty to instruct the jury with these cautionary instructions and to add the bracketed corroboration language into CALJIC No. 2.27.

Apart from whether the trial court has a sua sponte duty to give the cautionary instructions with respect to accomplice testimony when a codefendant testifies in a manner that tends to incriminate a defendant, we conclude defendant was not prejudiced by the trial court’s failure to give the instructions. It was uncontested that defendant and codefendant Turner were present in the Gregory apartment at the time of the shootings.

³ Defendant contends the exclusion of evidence violated his federal constitutional rights to present a defense and to due process of law. Defendant did not object to the exclusion of evidence on these grounds in the trial court and thus has forfeited his right to raise those issues on appeal. In any event, proper evidentiary rulings do not implicate a defendant’s federal due process rights. (*People v. Garcia, supra*, 224 Cal.App.3d at p. 305, fn. 7.) In this case, the trial court’s exclusion of evidence did not amount to the denial of the right to present a defense. (Cf. *People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

The jury was aware that defendant and codefendant Turner “had every motivation to shift blame to each other.” (*People v. Box* (2000) 23 Cal.4th 1153, 1209.) Both defendant and codefendant Turner testified and they each in fact attempted to shift the blame to the other. Defendant testified that he had no knowledge of codefendant Turner’s possession of a gun or his intent to shoot the Gregorys. Codefendant Turner testified that defendant had given him the gun and had forced him to shoot the Gregorys. Codefendant Turner’s testimony was corroborated in part by defendant’s testimony, Oral Gregory’s testimony, and Chontrell Gregory’s testimony. The jury rejected both defendant’s and codefendant Turner’s self-serving testimony and concluded the two had acted together to shoot the Gregorys. “Under these circumstances, it is not reasonably probable that the jury would have reached a result more favorable to defendant had it been instructed to view with care and caution that portion of [codefendant Turner’s] testimony that inculpated defendant.” (*Ibid.*)

III. Juror Misconduct

During most of the trial, defendant and codefendant Turner sat with their counsel at counsel table facing the judge. On a day towards the end of the trial, defendant was placed at the end of the table facing the jurors. During a break, a female juror approached the bailiff and informed the bailiff of “troubling eye contact from defendant Henry and inquired whether or not it would be feasible for the defendants to be somewhat repositioned at the counsel table . . . to minimize the prospect of that eye contact.” The juror may have been speaking for herself and others. Defendant, codefendant Turner and their counsel were repositioned at counsel table to once again face the judge. The trial court asked if there was anything further that the attorneys wished to raise as to this issue. Trial counsel for defendant responded that he would submit the matter.

Defendant contends the trial court erred when it failed to inquire of the jurors as to any possible juror bias or misconduct arising out of this issue. Defendant argues the trial court was on notice that at least one juror might have been biased by “troubling eye contact from defendant.” Defendant argues further that the jurors might have engaged in misconduct by discussing the eye contact among themselves.

We conclude there was no error. First, defense counsel was given every opportunity to request further inquiry into the matter and declined to do so. Thus, defendant has forfeited his right to raise this issue on appeal. Second, there was no indication of juror bias. Because of the way the parties and their attorneys were seated, at least one of the jurors found herself having eye contact with defendant and found the eye contact to be troubling. No doubt the eye contact with defendant was distracting. There is no indication that the eye contact was improper or intentional on the part of defendant. The trial court resolved the problem by modifying the seating arrangements. The trial court did not abuse its discretion by failing to further investigate the issue of juror bias. (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) Third, there was no juror misconduct. Even if there were discussions among the jurors about the parties’ seating arrangements, this was not a discussion concerning the case. (Cf. *People v. Hines* (1997) 15 Cal.4th 997, 1054.)

IV. Ineffective Assistance of Counsel

A. Law

A criminal defendant has a right to counsel that is guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 15 of the California Constitution. “The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The Sixth Amendment entitles a defendant to “effective assistance of counsel.” (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) This has been interpreted to mean that a defendant is entitled to the “““reasonably competent assistance of an attorney acting as his diligent conscientious advocate.””” (*Ibid.*) A finding that a defendant was deprived of the right to effective assistance of counsel requires that counsel’s performance be deficient and the defendant be prejudiced. (*Id.* at p. 1068.)

A defendant must show by a preponderance of evidence “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

In evaluating a claim of ineffective assistance of counsel, great deference is given to trial counsel to avoid ““second-guessing counsel’s tactics and chilling vigorous advocacy by tempting counsel”” to prepare for a subsequent claim of ineffective representation rather than defending a client during trial. (*In re Fields, supra*, 51 Cal.3d at p. 1069.) It is well established that a defendant is not entitled to an error-free representation. Even an unfortunate choice of strategy by a defendant’s counsel will not, in and of itself, constitute an inadequacy requiring reversal. (*People v. Wallin* (1981) 124 Cal.App.3d 479, 484-485.)

“Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions.” (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) “““[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.” [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) In such situations, because the issue

was never litigated in the trial court, facts necessary to a determination of the issue may be lacking. (*Ibid.*)

B. Prosecution Argument

The prosecutor requested that the trial court instruct the jury as to natural and probable consequences in the language of CALJIC No. 3.02. The trial court refused the instruction. During his opening argument, the prosecutor discussed defendant's guilt as an aider and abettor. "What about Henry? He didn't have any gun. He didn't have anything. He was just there making threats. How is he guilty? Why should he be held responsible? Well, there is something called aiding and abetting, principal liability. That's how Mr. Henry is guilty of the attempted murder. [¶] Okay. First, you have the concept [of] the princip[al]. Princip[al] is this: An aider and abettor is considered to be a principal. One who aids and abets is not only guilty of the particular crime to which that person aided and abetted, but is also guilty of any crimes committed by a principal, which are the natural and probable consequences of the crimes originally aided and abetted, meaning if you help somebody try to commit a crime, you're guilty just because you helped that person commit that crime. [¶] And the perfect example or the common example is the lookout. Defendant One goes into the store to rob the store of money while Defendant Two is looking out and is the getaway driver[.] The getaway driver[] and that lookout is also guilty of the robbery even though he never went inside that convenience store to rob, even though he never had the gun in his possession. [¶] This is what Mr. Henry is. He threatened him. He threatened Oral Gregory. He drove . . . Turner there to the location, first of all. Then he drove him away after the crime happened. [¶] That's aiding and abetting, and he was also the spokesperson of the group. Hey, if you don't pay me the money before I leave this house, you and your family are dead. That's aiding and abetting. So Mr. Henry is guilty for each and every crime Mr. Turner commits. [¶] So if you find Mr. Turner guilty of attempted murder and

you find that Mr. Henry helped him in any way, then he too is guilty of attempted murder.”

Defendant contends the prosecutor engaged in misconduct when the prosecutor misstated the law of aiding and abetting. Trial counsel for defendant did not object. Defendant contends trial counsel’s failure to object was ineffective assistance.

Although the prosecutor’s reference to the issue of natural and probable consequences was not entirely clear, there is no indication in the record of any intentional misconduct. The prosecutor did not explain the concept, other than to describe the law of aiding and abetting. The natural and probable consequences doctrine was applicable to the shooting of Chontrell Gregory to the extent the jury believed defendant intended to aid and abet the attempted premeditated murder of Oral Gregory and the shooting of Chontrell Gregory was a byproduct of the intended offense. The argument was not foreclosed by the trial court’s refusal of the jury instruction proffered by the prosecution. The comment was brief and innocuous. The jury was properly instructed on the law of aiding and abetting and further instructed to follow the law as given by the court and not as argued by the attorneys, if the two were different. There was no prejudice. Accordingly, trial counsel was not ineffective for failing to object.

C. Cocounsel Argument

During argument, counsel for codefendant Turner discussed the threats and menaces instruction. Codefendant Turner had testified that he had shot at Oral Gregory only because defendant had forced him and threatened to kill him. Defendant testified that he had not known that codefendant Turner had a gun and had been shocked when codefendant Turner had begun to shoot at Oral Gregory. Counsel argued: “We don’t know the exact relationship between Mr. Henry and Mr. Turner, but you may find it interesting that most of the witnesses referred to my client as Ricky or Turner, yet that guy over there is always referred to as Mr. Henry as if he’s someone to be feared or

respected. [¶] My client said he is not the kind of man that you can ask questions of. Did you observe his demeanor as he testified? Did you watch his demeanor in this courtroom? You have a man who is almost 40 years old with a 20-year-old, a man who picks him up to come and do work for him, who provides him with drugs.”

Defendant contends counsel for codefendant Turner engaged in misconduct when counsel referred to defendant’s demeanor in the courtroom. Trial counsel for defendant did not object. Defendant contends trial counsel’s failure to object was ineffective assistance.

It is true that references to a nontestifying defendant’s demeanor in the courtroom are improper. (*People v. Heishman* (1988) 45 Cal.3d 147, 196-197.) However, demeanor evidence is cognizable to the extent it bears on the credibility of a witness. (*Ibid.*) Defendant testified and therefore demeanor evidence was cognizable. There was no misconduct to which trial counsel should have objected. In addition, there is nothing in the record to indicate any courtroom demeanor of defendant that might have been prejudicial.

D. Cross-examination

During cross-examinations of defendant, both the prosecutor and counsel for codefendant Turner asked defendant if witnesses had been lying during specific parts of the testimony. Defendant’s trial counsel did not object. Defendant responded that the witnesses had in fact been lying. Defendant contends that the questions were improper and his trial counsel was ineffective for failing to object.

“The issue of whether it is misconduct for a prosecutor to ask a defendant on cross-examination whether another witness was lying has not been addressed in a published decision by any California court.” (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) “Given that there is no California authority establishing whether or not the questions were proper, defendant cannot establish that counsel’s failure to object to the

prosecutor's questions in this case 'fell below an objective standard of reasonableness.' [Citations.]" (*Id.* at p. 385.) We note that this trial took place in 2000. Trial counsel was not ineffective.

E. Accomplice Testimony Instructions

If we conclude that the trial court had no sua sponte duty to instruct the jury about accomplice testimony, defendant contends trial counsel was ineffective for failing to request the instructions. However, we have concluded that any error in failing to give the instructions was harmless. Accordingly, defendant is unable to establish ineffective assistance of counsel on this ground.⁴

V. Sentencing

Defendant received a life sentence for the attempted premeditated murder of Oral Gregory plus one year for the principal armed enhancement. As to the assault on Chontrell Gregory, defendant received a four-year (upper term) concurrent sentence. In imposing the upper term, the trial court found as a mitigating factor that defendant had previously successfully completed probation. The trial court also found as aggravating factors: (1) the crime involved great violence, great bodily injury, and the threat of great bodily harm; and (2) there were multiple victims. The trial court also noted: "There is some strength it would appear to the court on the evidence the court heard, at least a version of the facts that appears to have been embraced by the jury, that defendant Turner was induced by Mr. Henry to participate in the crime and occupied a position of

⁴ The evidence of defendant's guilt was compelling. Any cumulative error was not prejudicial.

leadership in the crime. In any event, the aggravating factors clearly outweigh the mitigating factors.” Defendant raised no objections.

Defendant contends he is entitled to a reversal of the upper term because the jury did not find the aggravating factors to be true as required by *Blakely v. Washington* (June 24, 2004, No. 02-1632) __ U.S. __ [2004 D.A.R. 7581]. However, defendant did not request a jury trial on the aggravating factors and thus the issue has been forfeited. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061; *United States v. Cotton* (2002) 535 U.S. 625, 634.) Moreover, any error was harmless beyond a reasonable doubt. The jury found that great bodily injury had been inflicted on both victims and the jury found there were multiple victims. The trial court did not expressly find that defendant had occupied a position of leadership but did note that the jury had impliedly so found by virtue of its guilty verdicts. The only mitigating factor was defendant’s previous successful completion of probation. Even without the leadership aggravating factor, the trial court found the aggravating factors *clearly* outweighed the one mitigating factor. We conclude there is no possibility of a more favorable result.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.